SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-530

RALEIGH H. LAWHON,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

REPLY BRIEF FOR PETITIONER

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In response to the Solicitor General's Memorandum for the United States in Opposition, Petitioner asserts that the three grounds set forth in the Petition for Certiorari remain for this Court's decision, i.e.:

1. The decision of the Court of Appeals below approving the variance between what Petitioner Lawhon was charged with and what he was convicted of is *contra* to the decision of the United States Court of Appeals for the Ninth Circuit in *Pocnian v. United States,* 294 F.2d 74 (9th Cir. 1961).

2. The Court of Appeals erred in holding that anyone who has possession and the ability to enjoy someone else's income is taxable on that income.

3. The Court of Appeals erred in holding that one who obtains income through unlawful means, such as embezzlement or extortion, is taxable on amounts restored to the true owner.

Ground #1: The *Poonian* problem.

The Petitioner, Lawhon was indicted principally for willfully understating *his fruit income.*

The proof failed to show that Lawhon owned the fruit which produced the income, and the Government admitted on brief that the fruit was owned by Lawhon's adult children.

The proof did show that Lawhon received checks in payment for his children's fruit, commingled the checks with his own bank accounts, kept a crude, unsophisticated record of the income and expenses attributable to his children's fruit, and made substantial payments to them from time to time, all with their approval and consent.

The jury was instructed to determine whether these checks were taxable to Lawhon, and was instructed that if Lawhon had possession and the ability to enjoy the income as his own, it was taxable to him.

By this instruction, the district court departed from the allegation in the Indictment that Lawhon willfully understated income from sales of *his fruit,* and permitted the jury to find him guilty of willfully understating income from sales of *his children's fruit.*

The decision of the Court of Appeals below upholding Lawhon's conviction of willfully understating in-

come from sales of *his children's fruit* based on an Indictment alleging that he willfully understated income from the sale of *his fruit* is *contra* to the decision of the United States Court of Appeals for the Ninth Circuit in *Poonian v. United States, supra.*[1]

Ground #2: The *Corliss* problem.

This Court, in *Poe v. Seaborn,* 282 U.S. 101 (1930), has already rejected the Commissioner's argument based on *Corliss v. Bowers,* 281 U.S. 376 (1930), that *control* of property, rather than ownership, is the test of taxability.

The key to the phrase from *Corliss* so freely quoted by the Court of Appeals and the Government is the word "may". This Court did not state that income that is subject to a man's unfettered command *shall* be taxed to him. It said, "*may* be taxed." Thus, as this Court held in *Poe v. Seaborn,* that phrase referred to the *power* of Congress to enact a specific taxing statute. The same was true in *Commissioner v. Lester,* 366 U.S. 299, 303, cited by the Solicitor General.

Ground #3: The "unlawful gains" problem.

The Court of Appeals sought to bolster its departure from the rule that ownership determines taxability

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[1] In an attempt to distinguish the *Poonian* case, the Solicitor General (Memorandum in Opposition n. 2) argued that Lawhon was found to have had a *beneficial interest* in the income. This is not the case. The jury was never instructed that it could find Lawhon had a beneficial interest in the income. To the contrary, as already seen, the jury was instructed that all that was needed to make the income taxable to Lawhon was that he have "possession and ability to enjoy" the income.

by citing the case of *Rutkin v. United States,* 343 U.S. 130 (1952), one of a line of cases holding that unlawful gains can be taxed to one who is not the owner. However, these cases require as a matter of law that moneys restored to the true owner not be taxed to the embezzler. *James v. United States,* 366 U.S. 213, 220 (1961). Therefore, contrary to the decision of the Court of Appeals, there could not be a question for the jury that the restored amounts might be gifts. Indeed, it is patently absurd to hold that Lawhon was taxable on the fruit income because he embezzled it from his children and then made gifts of the income to them!

It is therefore respectfully requested that a writ of certiorari issue.

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